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ATTORNEY WORK PRODUCT
PRIVILEGED AND CONFIDENTIAL

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MEMORANDUM

Re: Legal Effects of EPA Classification of ETS as a Group A Carcinogen

I. INTRODUCTION

The U.S. Environmental Protection Agency ("EPA" or "Agency") employs a carcinogen classification system to carry out its regulatory responsibilities under a variety of federal environmental statutes. EPA has been considering the addition of environmental tobacco smoke ("ETS") to its list of "Group A" or "known human" carcinogens. See "Health Effects of Passive Smoking: Assessment of Lung Cancer in Adults and Respiratory Disorders in Children" (review draft) (June 25, 1990). Questions have arisen about the effect, if any, such classification would have on federal and state regulation of smoking.

II. FEDERAL REGULATORY IMPACT

a. Environmental Protection Agency

Classification of ETS as a Group A carcinogen would have no significance so far as EPA's own regulatory responsibilities are concerned. EPA's carcinogen classification scheme was developed in 1984 to assist the Agency in carrying out its responsibilities with respect to pesticides, ambient air and water pollution. The scheme provides a means for EPA to evaluate the risks and benefits of potential carcinogens for these regulatory purposes. See 41 Fed. Reg. 21402-21405

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(1976); 49 Fed. Reg. 46294-46301 (1984); 51 Fed. Reg. 33992(1986). Since Congress has not authorized EPA to regulate indoor air contaminants, the designation of ETS as a Group A carcinogen would have no legal significance with respect to EPA itself.

The statutory authority under which EPA is proceeding in developing an ETS risk assessment (and associated workplace "policy guide") is Title IV of the Superfund Amendments, also known as the Radon Gas and Indoor Air Quality Research Act of 1986 ("SARA"). Section 403 of SARA limits EPA's authority to "provid[ing] information and guidance on the potential hazards of indoor air pollutants." In enacting Title IV, Congress specifically considered, but eventually declined, to give EPA regulatory authority with respect to indoor air. Obviously, the issuance of reports on ETS, by itself, would not confer authority on EPA where none previously existed. At most, EPA might use its conclusions concerning ETS as justification for seeking formal regulatory authority from Congress over indoor air in general or ETS in particular.

From a purely scientific (as opposed to a regulatory or public relations) perspective, classification of ETS as a Group A carcinogen also would have limited meaning. EPA's carcinogen classification scheme (Group A, Group B, etc.) refers to the amount and type of carcinogenicity data that are available on the substance being evaluated. The label affixed by EPA is not intended to denote the potency of the substance. Neither is EPA's classification scheme designed to reveal or

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confirm the extent of the hazard, if any, associated with the substance at levels typically encountered. As will be discussed in the next section, such determinations are made with respect to the workplace by the Occupational Safety and Health Administration ("OSHA") rather than EPA.

b. Occupational Health and Safety Administration

The only federal agency that possesses general regulatory authority concerning indoor air in the workplace is the Occupational Safety and Health Administration. On two occasions during the past several years, OSHA has considered and rejected petitions to ban or severely restrict smoking in the workplace. In connection with the most recently completed proceeding, OSHA concluded that "the currently available data are not sufficiently definitive" to support such measures. (Letter from Assistant Secretary, Occupational Health and Safety Administration, U.S. Dept. of Labor, to John F. Banzhaf, III, Action on Smoking and Health (Sept. 1, 1989)).

By letter dated November 30, 1990, OSHA's Administrator informed Action on Smoking and Health, which had filed a lawsuit complaining of OSHA's "inaction" on ETS, that "OSHA is not prepared, at the present time, to initiate rulemaking on ETS, although a final decision whether, and how, to proceed has not been reached." Approximately two weeks later, OSHA announced that it intended to issue -- sometime in the spring of 1991 -- a request for information covering a host of indoor air issues, including ETS. The options that would be available to OSHA thereafter range from the

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initiation of a regulatory proceeding on indoor air, which most likely would not be limited to ETS, to reaffirmation of current OSHA policies, which do not include regulation of workplace smoking other than in connection with exposure to asbestos. See 29 C.F.R. § 1910 et seq., § 1926 et seq. OSHA also indicated that "the final EPA risk assessment document, and particularly the comments of EPA's Science Advisory Board (SAB) on the pertinent health issues, could influence the structure and content of any regulatory initiative in this area."

Nothing in OSHA's statutes or regulations refer directly to EPA's carcinogenicity classification scheme. On occasion, OSHA has mentioned an EPA carcinogenicity determination as part of its rulemaking commentary. See, e.g., 55 Fed. Reg. 4052, 4055 (1990) (Occupational Exposure to Cadmium). A review of various OSHA rulemaking excerpts indicates, however, that historically an EPA carcinogenicity determination is given no more weight -- in fact, probably less -- than a similar determination by the International Agency for Research on Cancer ("IARC"), American Conference of Governmental Industrial Hygienists ("ACGIH"), National Institute for Occupational Safety and Health ("NIOSH"), or other federal agencies such as the Department of Health and Human Services. Usually, EPA's categorization is listed along with other similar and related findings as part of the historical justification for the initiation of rulemaking. Ibid. In these cases, there has been no indication that EPA's

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conclusion -- standing alone -- led in any direct fashion to OSHA's initiation of rulemaking.

This result appears in keeping with OSHA's statutory discretion to promulgate health or safety standards --

> upon the basis of information submitted * * * in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him.

29 U.S.C. § 655(b)(1).[1] It also is consistent with OSHA's Hazard Communication Standard, 29 C.F.R. § 1910.1200, which governs the evaluation and labeling of hazardous substances produced in or imported into the United States. Although this standard does not apply to tobacco or tobacco products (see 29 C.F.R. § 1910.1200(b)(6)(ii)), it nonetheless is revealing in that it lists the National Toxicology Program's Annual Reports on Carcinogens, the IARC Monographs and OSHA's own determinations "as establishing that a chemical is a carcinogen or potential carcinogen for hazard communications purposes." 29 C.F.R. § 1910.1200(d)(4). The standard does not refer to any EPA determinations of carcinogenicity.

On the other hand, Section 9(a) of the Toxic Substances Control Act ("TSCA") imposes certain obligations on EPA to notify other federal agencies about potentially

[1] In addition, OSHA is required to base final standards on the "best available evidence." 29 U.S.C. § 655(b)(5).

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hazardous chemical substances. Under Section 9(a),

> [i]f the Administrator has [a] reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment and determines, in the Administrator's discretion, that such risk may be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by the Administrator, the Administrator shall submit to the agency which administers such a law a report which describes such risk and includes in such description a specification of the activity or combination of activities which the Administrator has reason to believe so presents such risk.

15 U.S.C. § 2608. This provision would appear to oblige EPA to forward at least some risk assessments to the federal agency or agencies empowered to reduce the risk through regulation. The provision is not tied directly, however, to EPA's categorization of a substance as carcinogenic. Rather, it is based on a two-step determination of "unreasonable risk" and the potential reduction of that risk through non-EPA regulation. It should be emphasized, moreover, that tobacco and tobacco products are explicitly excluded from consideration under TSCA. See 15 U.S.C. § 2602(2)(B)(iii).

c. Other Federal Agencies

Except for the OSHA rulemaking documents discussed in the previous section, no federal agency appears to have relied upon an EPA carcinogenicity determination in any regulatory proceeding. As with OSHA, federal agencies generally have discretion to base rulemakings on any available information. In this respect, EPA's findings on ETS are

likely to be treated in the same way as the ETS reports by the Surgeon General and National Academy of Sciences. Group A status may provide, for example, at least part of the rationale for the imposition of additional smoking bans and restrictions in government facilities. Since these restrictions have been promoted by the Surgeon General and the Department of Health and Human Services for some time and many already are in place, it is difficult to assess how much EPA's risk assessment will add to the momentum.

In sum, although a determination by EPA that ETS is a Group A carcinogen may have substantial political and public relations implications, and may thereby spur further regulatory activity, the determination would not directly trigger any federal regulatory action as a matter of law.

III. IMPACT ON STATE LAW

a. State Statutes

Several state statutes refer explicitly to the EPA List of Carcinogens. Three of these states require their health departments to compile lists of hazardous substances for the purpose of determining threshold exposure limits in the workplace. Ala. Code § 22-33-4; Fla. Stat. § 442.103; Ga. Code Ann. § 45-22-5. These lists are drawn exclusively from designated sources that include EPA as well as others such as OSHA, NIOSH, ACGIH and the National Toxicology Program. To add a new substance to the state list from one of these sources, the statutes require notice and comment.

It is unlikely that ETS could be added to the Alabama, Florida or Georgia lists even with a Group A designation. Florida law exempts "toxic substances which are [s]old at retail trade establishments as consumer products." Fla. Stat. § 442.103(7)(b). Georgia exempts "[a]rticles intended for personal consumption by employees in the workplace." Ga. Code Ann. § 45-22-5(d)(3). Alabama's law contains three exemptions that by their terms would apply to cigarettes. Ala. Code § 22-33-4(d)(4)(5) and (6).[2] Two other states, Massachusetts and Pennsylvania, have statutes referring to EPA-designated carcinogens for the compilations required by their hazardous disclosure/right-to-know laws. Mass. Ann. Laws Ch. 111F, § 4; Pa. Stat. § 7303. Neither of these laws, however, authorize or require state agencies to take any regulatory action with respect to the carcinogens listed in the compilations.

A few additional states, including California, Minnesota, New Jersey and Rhode Island, refer to EPA-designated carcinogens as part of pesticide residue, groundwater and outdoor air pollution control and monitoring

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[2]The Alabama law does not apply to:

> "(4) Articles intended for personal consumption by employees in the workplace;
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> (5) Articles packaged for distribution to, and used by, the general public;
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> (6) Articles sold or used in retail food establishments and retail trade establishments."

Ala. Code § 22-33-4(d).

statutes. Cal. Code § 12535; Minn. Stat. 103H.201; N.J. Stat. Ann. § 58:112A-13; R.I. Gen. Laws § 23-23-3. None of these would seem to apply to or represent a real concern in the case of ETS.

Based on this survey, it is clear that at least a few states rely upon or take into account EPA's carcinogen list for the purpose of workplace health and safety and other environmental regulation. This reliance is in addition to older and more established sources like OSHA. Designation of ETS as a Group A carcinogen, however, would not trigger automatically any state regulatory action. As with federal agencies, however, state and local regulators and legislators may rely in whole or in part on EPA's risk assessment to justify the imposition of new measures directed against smoking.[3]

b. Treatment of Carcinogens Under State Workers' Compensation Laws

Under state workers' compensation laws, exposure to substances deemed carcinogenic is treated no differently than any other injury claim. A claimant seeking to recover for a workplace injury allegedly caused by exposure to a carcinogen must prove that he was acting within the course of his employment at the time of the injury and that the injury was

[3]In addition to statutes that refer explicitly to EPA, the regulations implementing the California Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) recognize EPA as an "authoritative body" for purposes of identifying chemicals" known to the state to cause cancer * * *." Cal. Admin. Code tit. 22, § 12306. Proposition 65 would not be affected by EPA's Group A designation since ETS already is on the California list of chemicals "known to the state to cause cancer."

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proximately caused by conditions or substances encountered as a result of employment.

A decision by EPA to classify ETS as a Group A carcinogen is likely to have some impact on these claims, though not a conclusive one. It should be noted, however, that although workers' compensation statutes tend to be similar in many respects, individual state laws and requirements vary. Thus, specific cases must be evaluated in light of the workers' compensation statute applicable to the jurisdiction in which the claim is made.

As will be discussed in greater detail below, it may be to an employer's advantage for claims concerning ETS to be handled under state workers' compensation schemes. If the employer can establish that the claimant's illness was either not caused by ETS or was attributable to ETS exposure at sites other than the workplace, the employee typically would be foreclosed thereafter from pursuing any other legal remedies against the employer.

1. Evidentiary Significance of Group A Classification

EPA's classification of ETS as a Group A carcinogen conceivably would have some evidentiary significance on the question of whether ETS is generically capable of causing disease in humans. But even in the absence of EPA's classification of ETS as carcinogenic, a claimant could point to the views on ETS that have been expressed by other purportedly authoritative sources and seek to substantiate ETS

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allegations by means of medical testimony.[4] Moreover, classification by EPA would have no relevance to the remaining prerequisites for a claim.

Even assuming that ETS could be shown to be capable of causing cancer in humans in some circumstances, the claimant still would have to prove both that he was exposed to ETS while at work (as opposed to his home or elsewhere) and that this exposure (as opposed to exposure to the numerous other possible causes of cancer) was the proximate cause of his illness. The Oregon workers' compensation statute, for example, defines a compensable "occupational disease" as a disease or infection that arises out of or in the course of employment "caused by ingestion of, absorption of, inhalation of or contact with dust, fumes, vapors, gasses, radiation or other conditions or substances to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein * * *." Or. Rev. Stat. 656.802(1)(a) (emphasis supplied).

Courts also have emphasized that "[a]n 'occupational disease' derives from the very nature of the employment, not a specific condition peculiar to the employee's place of work." Mack v. County of Rockland, 530 N.Y.S. 2d 98, 99 (Ct. App. 1988) (original emphasis). In Gacioch v. Stroh Brewery Co.,

[4]The claimant could be expected to rely, for example, on the ETS reports of the Surgeon General and National Academy of Sciences. These reports, although now somewhat dated, are likely to be given at least as much weight as any report by EPA.

396 N.W.2d 1 (Mich. 1986), for example, a brewery employee sought workers' compensation benefits based on chronic alcoholism he claimed arose from the course of his employment in the brewery, which had a practice of providing free beer to employees. The Michigan Supreme Court held that "[i]f chronic alcoholism can be categorized as an ordinary disease of life to which the public is generally exposed outside of the employment, plaintiff is not entitled to a workers' compensation award." Id. at 4. The court then remanded the case to determine whether brewery workers were more prone to develop chronic alcoholism than the general public. The court noted, however, that expert testimony had asserted that the claimant "would have most likely become an alcoholic anyway and his drinking outside of work eventually [was] far greater than during work." Id. at 5.

Even if the claimant's alleged ETS-induced injury is not an occupational disease, it still may constitute an occupational "accident" compensable under workers' compensation. In Johannesen v. New York City Department of Housing, 546 N.Y. S.2d 40 (App. Div. N.Y. 1989), for example, the court upheld a claim that exposure to ETS at her work station aggravated the plaintiff's bronchial asthma and required her to be hospitalized with two asthma attacks. In Schober v. Mountain Bell Telephone, 600 P.2d 283 (Ct. App. New Mex. 1978), a New Mexico court found that if constant exposure to tobacco smoke at work was demonstrated to have triggered the claimant's allergies, causing him to collapse, there was

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an "accidental" injury compensable under the state statute.

It is not clear how widely these decisions will be followed. The dissent in Schober argued that benefits should be denied because the injury did not "arise out of employment." "[A] risk common to the public generally and not increased in any way by the circumstances of the employment is not covered by our act." Id. at 285, quoting Gilbert v. E. B. Law & Sons, Inc., 287 P.2d 992 (N.M. 1955). In addition, it is not clear that courts would construe lung cancer as an "accident" even if they were willing to so classify a discrete allergic or asthmatic reaction to a perceived irritant. Indeed, the difficult issues of causation and workplace specificity involved in such claims have led at least one antismoking commentator to conclude that most courts are unlikely to find that the harm allegedly due to ETS constitutes a compensable injury or occupational disease. See R. Paolella, The Legal Rights of Nonsmokers in the Workplace, 10 U. Puget Sound L. Rev. 591 (1987). As will be discussed below, however, there are reasons why antismokers would seek to advance this argument and why employers may be disadvantaged as a result.

2. Firefighters Exposed to Carcinogens on the Job Are Treated Specially in Some States

A few states, including California, Minnesota and New Hampshire, provide special treatment for workers' compensation claims by firefighters (and sometimes policemen) who develop cancer. E.g., 44 Cal. Code § 3212.1; Minn. Stat.

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§ 176.11; N.H. Rev. Stat. Ann. § 281-A:17. The statutes create for these workers a rebuttable presumption that their cancer has arisen from the course of employment if there was exposure at work to a "known carcinogen," typically as defined by IARC,[5] and if the carcinogen is reasonably linked to the cancer.

Even with this special presumption, however, the claimant still must overcome several evidentiary hurdles to recover. In Zipton v. Workers' Compensation Appeals Board, 267 Cal. Rptr. 431 (Cal. App. 1 Dist. 1990), a California appellate court denied death benefits to a widow of a firefighter who died from cancer. The autopsy revealed that he had died of "'metastatic undifferentiated carcinoma involving liver, hepatic, pancreatic and periaortic lymph nodes, left adrenal, right and left lung.'" Id. at 433. Although both parties agreed that the firefighter had been exposed to a number of carcinogens while fighting fires, the primary entry site for the cancer could not be identified. For this reason, the court held that the widow had failed to

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[5]IARC has stated that the results of the epidemiological studies of lung cancer and ETS are "compatible either with an increase or with an absence of risk." IARC also has stated, however, that ETS contains chemicals that are both carcinogenic and mutagenic. Although the epidemiological studies are not conclusive, according to IARC, "[k]nowledge of the nature of sidestream and mainstream smoke, of the materials absorbed during 'passive' smoking, and of the quantitative relationships between dose and effect that are commonly observed from exposure to carcinogens, * * * leads to the conclusion that passive smoking gives rise to some risk of cancer." World Health Organization, IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans, Tobacco Smoking, Vol. 38, pp. 308, 314 (1986).

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show that her late husband's cancer was reasonably linked to exposure to carcinogenic substances on the job. Without such linkage, the presumption that the cancer had arisen in the course of employment was unavailable.

Interestingly, the special treatment afforded policemen and firemen has provided grounds in at least one case for the denial of workers' compensation benefits for harm allegedly due to ETS. In Palmer v. High Sierra, No. 21618 (Ninth Judicial District, 1989), appeal pending, No. 20338 (Nevada Supreme Court), a former casino worker brought a workers' compensation claim alleging that he had developed asthma and other pulmonary disease as a result of ETS exposure. A Nevada trial court upheld the denial of benefits on the ground that the Nevada statute limits compensation for lung disease to policemen and firemen.

3. Some Employees Alleging "Hypersensitivity" to ETS Have Filed Claims Under State Workers' Compensation Law

As noted, some nonsmokers have successfully litigated workers' compensation claims based on exposure to ETS. None of these cases, however, has involved claims of lung or other cancer. In almost all cases, the claimant has alleged "hypersensitivity" to tobacco smoke or that exposure to ETS in the workplace aggravated a preexisting medical condition or caused coughing and other respiratory problems. Although a few courts have been willing to recognize such claims as compensable occupational illnesses or injuries, claimants still face serious difficulties in establishing that

their particular problems were caused by exposure to ETS in the workplace.

In the case of In re Marlene Ritchie, No. 84-07248 (Or. Workers Comp. Bd. 1985), for example, the Board rejected an Oregon employee's claim that exposure to ETS at work caused her coughing and other respiratory symptoms. In its decision, the Board emphasized that air quality samples taken at the claimant's office were in "good order" while those taken in the coffee shop the claimant frequented were high in particulate matter, formaldehyde and carbon monoxide.

More recently, a Florida appellate court overturned an award to an employee who claimed that workplace exposure to ETS had aggravated his preexisting emphysema. Although the court noted that "neither of the medical experts cited definitive studies conclusively demonstrating [a] causal connection or lack of it from this kind of exposure," the court nonetheless found the evidence sufficient to support a determination that, theoretically at least, a causal connection could exist. ATE Fixture Fab v. Wagner, 559 So. 2d 635, 638 (Fla. App. 1st Dist. 1990). Even so, the court concluded that the claimant had failed to demonstrate that his work-related exposure to ETS actually had aggravated his preexisting condition.

As these decisions illustrate, an employer actually may be better off if it is determined that an alleged ETS injury theoretically is compensable as an occupational illness or injury under the workers' compensation statute. If the

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illness or injury is covered, workers' compensation provides the employee's exclusive remedy against the employer. If such injuries are not compensable, the employee is free to pursue common law remedies against the employer, exposing him to much greater potential liability. See McCarthy v. Department of Social and Health Services, 730 P.2d 681 (Wash. Ct. App. 1986), aff'd, 759 P.2d 351 (Wash. 1988). In re Marlene Ritchie and ATE Fixture Fab thus may constitute the best possible outcome from the employer's standpoint. Although the injuries allegedly attributable to ETS were held to be compensable within the meaning of the state statutes involved in those cases, both claimants failed to satisfy other prerequisites to an award. At the same time, the employers involved gained protection from suit based on the common law.

c. Other Claims in State Courts and Before Administrative Tribunals

Other ETS-related claims against employers often have involved purportedly "hypersensitive" individuals seeking to compel their employers to ban smoking in the workplace. To our knowledge, none of these cases has alleged that ETS caused the plaintiff to develop lung or any other cancer. Still other actions have been filed with courts based on common law theories such as negligence. Finally, a few claims have been advanced (both in court and before administrative tribunals) based on state fair employment or similar laws.

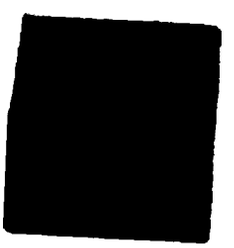
In cases based on common law theories, plaintiffs have had limited success. They have had more success relying on fair employment and other antidiscrimination laws. In

County of Fresno v. Fair Employment Housing Commission, No. F012316 (Cal. App. 5th Dist., January 23, 1991), for example, the California Fair Housing and Employment Commission had awarded $70,000 to two county employees who claimed to be "handicapped" by their purported hypersensitivity to ETS. Although the award of damages eventually was reversed, a state appellate court recently held that the County had failed to accommodate the plaintiffs under the California Fair Employment and Housing Act by providing them with a separate, nonsmoking office area. Slip op. at 18-19.

As with worker compensation suits, classification of ETS as a Group A carcinogen may be of some evidentiary value in such proceedings on the issue of whether ETS can in some circumstances cause cancer in humans. The plaintiff still would have to prove, however, that the exposure to ETS took place during working hours rather than at home or elsewhere and that ETS rather than other factors was the proximate cause of the cancer. These causation issues are likely to be extremely complex, reducing a plaintiff's chances of prevailing even with a Group A designation. Thus, although classification of ETS as a Group A human carcinogen may have some significance to employee claims of this nature, it is unlikely to be sufficient -- in and of itself -- for relief to be awarded.

Finally, EPA's classification of ETS as a Group A carcinogen might affect child custody suits in which the non-custodial parent claims that the custodial parent is harming a

child by exposing him to ETS. EPA's risk assessment and policy guide on ETS assert that young children exposed to ETS are more susceptible to respiratory diseases than children who are not exposed. As with other civil litigation, EPA's reports might be used as evidence in such proceedings. Courts may be receptive to such claims because the health of a young child purportedly is involved. See, e.g., Bullock v. Reeves, Case No. 44333 (Tenn. 4th Cir. Ct). Even if a court accepts the proposition that ETS may have adverse effects on children in some circumstances, however, medical examination of the individual child may reveal no discernible illness or injury. See, e.g., Poff v. Poff, No. AD 1989-703 (Crawford County Court of Common Pleas, Pa.).



IV. CONCLUSION

Classification of ETS as a Group A carcinog provide evidence to support a wide variety of legis regulatory and judicial actions against smoking. itself, however, such a classification will have immediate regulatory or other legal impact on s

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